

110TH CONGRESS
2D SESSION

S. 2801

To help families avoid foreclosure and stay in their homes by encouraging reasonable and responsible modifications for unworkable and impractical mortgage loans, and to help preserve the rights of investors by reaffirming the basic obligations of their investment agents to achieve the most beneficial outcomes for their clients and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 2, 2008

Mr. REID (for Mrs. CLINTON) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To help families avoid foreclosure and stay in their homes by encouraging reasonable and responsible modifications for unworkable and impractical mortgage loans, and to help preserve the rights of investors by reaffirming the basic obligations of their investment agents to achieve the most beneficial outcomes for their clients and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Mortgage Enhance-
5 ment and Modification Act of 2008”.

1 **SEC. 2. SAFE HARBOR FOR QUALIFIED LOAN MODIFICA-**
2 **TIONS OR WORKOUT PLANS FOR CERTAIN**
3 **RESIDENTIAL MORTGAGE LOANS.**

4 (a) STANDARD FOR LOAN MODIFICATIONS OR WORK-
5 OUT PLANS.—Absent specific contractual provisions to the
6 contrary—

7 (1) the duty to maximize or not negatively af-
8 fect, the recovery of total proceeds from pooled resi-
9 dential mortgage loans is owed by a servicer of such
10 pooled loans to the securitization vehicle for the ben-
11 efit of all investors and holders of beneficial interests
12 in the pooled loans, in the aggregate, and not to any
13 individual party or group of parties;

14 (2) a servicer of pooled residential mortgage
15 loans shall be deemed to be acting on behalf of the
16 securitization vehicle in the best interest of all inves-
17 tors and holders of beneficial interests in the pooled
18 loans, in the aggregate if—

19 (A) for a loan that is in payment default
20 under the loan agreement or for which payment
21 default is imminent or reasonably foreseeable,
22 the loan servicer makes reasonable and docu-
23 mented efforts, which shall be made available to
24 the investors and holders of beneficial interests
25 in the pooled loans upon request, to implement
26 a modification or workout plan; or

1 (B) the efforts under subparagraph (A)
2 are unsuccessful or such plan would be infeasible,
3 engages in other loss mitigation, including
4 accepting a short payment or partial discharge
5 of principal, or agreeing to a short sale of the
6 property, to the extent that the servicer reasonably
7 believes the modification or workout plan
8 or other mitigation actions will maximize the
9 net present value to be realized on the loans
10 over that which would be realized through foreclosure
11 under the present terms of the contract;
12 and

13 (3) a servicer shall be deemed to be acting on
14 behalf of the securitization vehicle in the best interest
15 of all investors and holders of beneficial interests
16 in the pooled loans, in the aggregate, if the servicer
17 makes efforts—

18 (A) to proactively contact borrowers that
19 are reasonably considered to be approaching a
20 calendar date in which a predetermined or contractually
21 established rate of interest on the
22 principal of the loan shall—

23 (i) increase or fluctuate in accordance
24 with a designated market indicator or indicators; or
25

1 (ii) increase or fluctuate within a pre-
2 determined range; and

3 (B) to determine—

4 (i) the ability of the borrower to make
5 payments following a reset of interest rates
6 using common and appropriate metric
7 standards such as debt to income ratios;

8 (ii) whether the borrower is in danger
9 of default or disclosure; and

10 (iii) whether a loan modification or
11 other mitigation effort is appropriate.

12 (b) SAFE HARBOR.—Absent specific contractual pro-
13 visions to the contrary, a servicer of a residential mortgage
14 loan that acts in a manner consistent with the provisions
15 set forth in subsection (a), shall not be liable for entering
16 into a qualified loan modification, or other loss mitigation
17 effort described in subsection (a) to—

18 (1) any person, based on that person's owner-
19 ship of a residential mortgage loan or any interest
20 in a pool of residential mortgage loans or in securi-
21 ties that distribute payments out of the principal, in-
22 terest, and other payments in loans on the pool;

23 (2) any person who is obligated to make pay-
24 ments determined in reference to any loan or any in-
25 terest referred to in paragraph (1);

1 (3) any person that insures any loan or any in-
 2 terest referred to in paragraph (1) under any law or
 3 regulation of the United States or any law or regula-
 4 tion of any State or political subdivision of any
 5 State; or

6 (4) any other person or institution that may
 7 have a financial or commercial relationship and asso-
 8 ciation with the persons associated in paragraphs (1)
 9 through (3).

10 (c) RULE OF CONSTRUCTION.—No provision of this
 11 section shall be construed as limiting the ability of a
 12 servicer to enter into loan modifications or workout plans
 13 other than qualified loan modification or workout plans.

14 (d) DEFINITIONS.—As used in this section, the fol-
 15 lowing definitions shall apply:

16 (1) QUALIFIED LOAN MODIFICATION OR WORK-
 17 OUT PLAN.—The term “qualified loan modification
 18 or workout plan” means a modification or plan
 19 that—

20 (A) is scheduled to remain in place until
 21 the borrower sells or refinances the property, or
 22 for at least 5 years from the date of adoption
 23 of the plan, whichever is sooner;

1 (B) does not provide for a repayment
2 schedule that results in negative amortization
3 at any time;

4 (C) does not require the borrower to pay
5 additional points and fees;

6 (D) materially improves the ability of the
7 borrower to—

8 (i) prevent foreclosure; and

9 (ii) resume a reasonable repayment
10 schedule based on, but not limited to, debt
11 to income ratio; and

12 (E) would reasonably reduce the likelihood
13 of default of foreclosure during the life of the
14 modification or plan;

15 (F) may waive any prepayment penalties
16 that reasonably inhibited a loan holder from
17 fulfilling his ability to pay down the principal or
18 maintain regular payments as defined by the
19 terms of the loan; and

20 (G) includes full and accurate disclosure to
21 the borrower of the terms of the modification or
22 workout plan, provided that such disclosures
23 are executed in easy to understand terms that
24 demonstrate how the borrower will benefit from
25 the new terms in such modification or workout

1 plan as compared with the terms and conditions
2 of the previous loan of the borrower.

3 (2) RESIDENTIAL MORTGAGE LOAN.—The term
4 “residential mortgage loan” means a loan that is se-
5 cured by a lien on an owner-occupied residential
6 dwelling.

7 (3) SECURITIZATION VEHICLE.—The term
8 “securitization vehicle” means a trust, corporation,
9 partnership, limited liability entity, special purpose
10 entity, or other structure that—

11 (A) is the issuer, or is created by the
12 issuer, of mortgage pass-through certificates,
13 participation certificates, mortgage-backed secu-
14 rities, or other similar securities backed by a
15 pool of assets that includes residential mortgage
16 loans; and

17 (B) holds such loans.

18 (e) LIMITATIONS ON SAFE HARBOR.—Except for the
19 provisions of section 2 that limit liability for efforts to pur-
20 sue qualified loan modifications or workout plans, the pro-
21 visions of this section shall not be construed to affect or
22 limit any other liability, duty, or other fiduciary obligation
23 of the servicer to the investors and holders of beneficial
24 interests in the pooled loans to a securitization vehicle, as
25 prescribed by any other specific contractual provision

1 agreed upon, or any other liability, duty, or other fiduciary
2 obligation set forth under any—

3 (1) law or regulation of the United States;

4 (2) law or regulation of any State or political
5 subdivision of any State; or

6 (3) established and approved standards for best
7 practices of any industry or trade group.

8 (f) EFFECTIVE PERIOD.—This section shall apply
9 only with respect to qualified loan modification or workout
10 plans initiated prior to January 1, 2012.

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